

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

PACIFIC MARITIME ASSOCIATION

and

Case 21-CA-39434

ERIC ALDAPE, An Individual

INTERNATIONAL LONGSHORE AND WAREHOUSE
UNION, LOCAL NO. 13, AFL-CIO
(Pacific Maritime Association)

and

Case 21-CB-14966

ERIC ALDAPE, An Individual

David Reeves, Esq. for the General Counsel.
Eric Adalpe, Pro se.
Clifford D. Sethness, Esq.,
(Morgan, Lewis & Bockius LLP)
of Los Angeles, California, for Respondent PMA.
Gillian Goldberg, Esq. (Holguin, Garfield,
Martinez & Quinonez) of Los Angeles, California.
for Respondent ILWU.

DECISION

STATEMENT OF THE CASE

John J. McCarrick, Administrative Law Judge. This case was tried in Los Angeles, California, on July 18 and 19, 2011. The charge was filed August 4, 2010 and the consolidated Complaint was issued on April 29, 2011.

The consolidated Complaint (Complaint) alleges that Pacific Maritime Association (PMA) violated Section 8(a)(1) of the Act by its involvement in prosecution of a grievance filed by Wallace Realini against charging party Eric Aldape (Aldape) under section 13.2 of the collective bargaining agreement between PMA and International Longshore and Warehouse Union, Local No. 13, AFL-CIO (ILWU).

The Complaint also alleges that ILWU violated section 8(b)(1)(A) of the Act by its involvement in prosecution of three grievances against Aldape under section 13.2 of the collective bargaining agreement, by implementing penalties against Aldape pursuant to the grievances and by maintaining records of the grievance proceedings.

Respondents filed timely Answers to the Complaint stating they had committed no wrongdoing.

5 FINDINGS OF FACT

Upon the entire record herein, including the briefs from the Counsel for the Acting General Counsel, for ease of reference herein General Counsel, and Respondents, I make the following findings of fact.

10

I. Jurisdiction

15

The parties stipulated¹ that during the 12-month period ending December 31, 2010, a representative period, employer-members who participated in association bargaining through the PMA in conducting their business operations within the State of California at harbors along the West Coast of California, including those in the vicinity of Long Beach and Los Angeles, California, derived revenues in excess of \$50,000 for furnishing or functioning as essential links, including providing longshore and stevedoring services, in the transportation of passengers and freight from the State of California directly to points outside the State of California.

20

Based upon the above, Respondent PMA is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organization

25

Respondents admitted and I find that the ILWU is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

30

A. The Facts

The essential facts in this case are not in dispute and the parties have stipulated to most of the facts.²

35

The PMA, on behalf of its employer members who engage in the stevedoring business on the West Coast of the United States, engages in collective bargaining with the ILWU, on behalf of its longshore locals on the West Coast. That bargaining has resulted in a series of collective bargaining agreements, the latest of which is entitled "The Pacific Coast Longshore Contract Document" (PCLCD), effective from July 1, 2008 to July 1, 2014. The PCLCD is administered at the ports by the Joint Port Labor Relations Committee (JPLRC) on which local employers in Long Beach and Los Angeles and ILWU, Local 13 have equal representation.

40

Section 13 of the PCLCD³ deals with discrimination and harassment in employment. Section 13.1 provides in pertinent part that:

45

¹ GC Exh. 7.

² Ibid.

³ GC Exh. 6.

50

There shall be no discrimination in connection with any action subject to the terms of this Agreement . . . either in favor or against any person because of membership or non membership in the Union, activity for or against the Union, or absence thereof, race, creed, color, sex . . . age . . . national origin, religious or political beliefs, disability, protected family care or medical leave status, veteran status, political affiliation or marital status. . . .

Section 13.2⁴ provides in pertinent part:

All grievances and complaints alleging incidents of discrimination or harassment . . . in connection with any action subject to the terms of this Agreement based on race, creed, color, sex . . . age . . . national origin, religious or political beliefs, disability, protected family care or medical leave status, veteran status, political affiliation or marital status. . . shall be processed solely under the Special Grievance/Arbitration Procedures for the Resolution of Complaints Re Discrimination and Harassment under the Pacific Coast Longshore & Clerk's Agreement (See ILWU-PMA Handbook-Special Section 13.2 Grievance Procedures and Guidelines for Remedies . . .

Section 13.3⁵ provides in pertinent part:

Grievances and complaints . . . and discrimination claims based on . . . membership or non membership in the Union, or activity for or against the Union or absence thereof, are not to be filed under the Special Section 13.2 Grievance Procedures, but instead are to be filed and processed with the Joint Port Labor Relations Committee (JPLRC) under the grievance procedures in Section 17.4 of the PCLCA.

The procedures to be followed by individuals filing complaints arising out of section 13.2 are set forth in the ILWU-PMA Handbook,⁶ an addendum to the PCLCD. Unlike the grievance provisions for alleged contract violations under Section 17.21 of the PCLCD,⁷ an individual may directly file a Special Grievance under Section 13.2.⁸ Section 17 grievances are initially referred to the JPLRC, the joint PMA-ILWU committee. If there is no resolution at the JPLRC level, the parties may refer the grievance to a higher authority, including an arbitrator.

Under the provisions of the ILWU-PMA Handbook at Section III "Detailed Special Grievance Procedures", an individual may file a grievance form with the JPLRC who forwards the form to the arbitrator, who must schedule a hearing to determine if there is merit to the grievance. At the hearing, the charged party is entitled to representation by the Union or a Union member of their choice. The hearing is transcribed and witnesses and documentary evidence is presented. The Arbitrator is required to issue a decision within 14 calendar days. The Arbitrator's decision is final unless appealed within 15 days to the Coast Appeals Officer. The Coast Appeals Officer reviews the written record and may affirm, reverse or modify the Arbitrator's decision. The Coast Appeals Officer's decision is final and may not be appealed. The JPLRC is required to implement the remedies contained in the final decision. According to Steve Fresenius, Assistant Area manager for PMA, while PMA maintains records of 13.2

⁴ Ibid.

⁵ Ibid.

⁶ GC Exh. 2.

⁷ GC Exh. 6 at 87.

⁸ GC Exh. 2.

proceedings, the 13.2 proceeding may not be used against the charged party in any future hiring action or other proceeding where there is a finding of not guilty.

ILWU Local 13 is an affiliate local union of the ILWU. ILWU Local 13 represents those bargaining unit members working under the PCLCD in the Ports of Long Beach and Los Angeles, and administers and enforces the PCLCD in those ports.

Aldape has been a member of Local 13 and has been employed at various PMA member employers in the ports of Long Beach and Los Angeles as a crane operator for the past 13 years. Aldape has been active in Local 13 intra-union politics for a number of years since at least 2008.

Shortly before the Union elections on September 8-10, 2009, Aldape authored a handbill entitled "This is my Style, the Click and their Cronies are in Denial."⁹ In the handbill Aldape attacked Union member Mark Jurisic. At this time Jurisic was not a Union officer. In the handbill Aldape wrote:

Mark are you going to let this membership know, what I already know? Did one of your family members fail the drug and alcohol screen test and does that same family member retain, a active casual card? (Yes or No). I know it is yes in my opinion.

Jurisic had two sons and a daughter working as casual longshore workers at the ports in Los Angeles and Long Beach. Margarite Jurisic-Droege (Droege) is Jurisic's daughter. Shortly after the handbill was published Droege saw a text message that said in part, "Mark Jurisic [sic]daughter failed her drug test & covered up by jurisic click! Eric will hit mic."¹⁰ There is no evidence as to who sent this text message.¹¹

In fact, unknown to Aldape at the time of his diatribe against Jurisic's family in September 2009, Droege had been sent a letter from the Joint Port Labor Relations Committee on March 27, 2007, indicating that she had failed to pass a drug and alcohol screening test that she had taken on March 23, 2007. When Droege received this letter she immediately requested a retest. On April 2, 2007, she was given a retest as a result of medical error on the first test that resulted in her passing the drug and alcohol screen.¹² It is undisputed that Aldape's allegation that one of Jurisic's children failed a drug and alcohol screen was based on rumor and innuendo.

Grievance SCGM-0005-2009 was filed by Margarite Jurisic-Droege on September 10, 2009.¹³ It alleges that Aldape discriminated against Droege based upon sex in that he accused her of failing a drug test. In her grievance Droege states:

I am Mark Jurisic's only daughter in this industry and I have never tested positive for drugs or alcohol in m life. Now my reputation has been smeared and I am humiliated. . . . I am humiliated and I cannot deal with this intimidation any longer.

⁹ GC Exh. 8.

¹⁰ GC Exh. 3, at 71.

¹¹ Aldape denied sending the text.

¹² PMA Exhs. 1 and 2.

¹³ GC Exh. 3.

There is no other job in this country where a woman would be subjected to this kind of harassment. I am asking for this harassment to end immediately.¹⁴

Droege's grievance was heard by area arbitrator David Miller on September 24, 2009. Miller issued a decision on October 5, 2009, finding Aldape guilty of violating section 13.2 and assessing a penalty of 30 days off work with 21 days suspended, completion of diversity training and confinement to the first shift until December 5, 2009. Aldape appealed this decision to the Coast Appeals Officer, Rudy Rubio, on October 16, 2009. Rubio issued his decision on October 27, 2009, denying the appeal and amending the penalty to decrease the amount of suspended days off to 15 from 21, thus increasing the days off work from 9 to 15.

On September 24, 2009, Aldape left a voice mail message¹⁵ for Steven Bebich, a Union member and political opponent of Aldape, full of profanity and a threat to expose wrongdoing by Bebich. The message states:

Hey, what's up Mike? I heard you are coming out with a letter on me Bro. You've got no balls Bro. If you had balls you would have told me when you saw me today. Feel free to write that I am stupid bro. Just remember that I know about the fucking computer you stole, about why you got arrested. I don't have a problem writing it bro, to the membership bro. You've got my number you call me. Don't waste your time calling me write you're fucking shit bro I'll write my shit about you bro. You'll see that no one will waste their time picking up your fucking letter bro but you watch how many people pick up mine. Later.

At the time, Bebich was not a Union officer.

Grievance SCGM-0009-2010 was filed by Steven Bebich on October 2, 2009, alleging that Aldape engaged in racial and prohibitive discrimination or harassment based on the September 24, 2009 voice mail. Bebich stated in his grievance:

I believe that Mr. Aldape has violated my rights by threatening to reveal confidential information about me. Information that he had never substantiated nor does have any firsthand knowledge of. What Mr. Aldape is attempting to do is nothing less than blackmail. . . . I am asking that you hear this complaint under Section 13.2 because I believe that Mr. Aldape has verbally harassed me, created a hostile work environment and threatened me in a retaliatory manner.¹⁶

Arbitrator Miller initially dismissed the grievance as not meeting the criteria of a Section 13.2 violation, but Coast Appeals Officer Rubio, upon Bebich's appeal, remanded the grievance to Miller for hearing. After hearing the case, Miller issued his decision on December 2, 2009, fining Aldape guilty of violating section 13.2. The penalty assessed called for the 15 days off, all work held in suspension by Rubio in the Droege case activated,¹⁷ an additional 45 days off work, and confinement to the first shift for two years. Aldape appealed this decision to Coast Appeals Officer Rubio on December 17, 2009. On December 29, 2009, Rubio denied the appeal.

¹⁴ GC Exh. 3, at 108.

¹⁵ GC Exh. 4, at 82.

¹⁶ GC Exh. 4, at 6.

¹⁷ GC Exh. 4, at 85.

It is undisputed that Aldape's insinuations and threats to Bebich on September 24 were based upon rumor. The record reflects that Bebich was arrested in San Francisco but that the charges were dismissed. Bebich admitted that he was accused by his employer of stealing a computer but that this complaint was withdrawn. Aldape was unaware of any of these facts at the time he left his voice mail.

On about May 16, 2010, Aldape published a handbill entitled "*EX OFFICERS FAMILY A MECHANIC THAT'S WHY THERE IS NO PANIC.*"¹⁸ In the handbill, Aldape is critical of the way mechanics are dispatched. Aldape asserts he received no information about how mechanics were included in the Union or how they were elevated to A status for priority referral. No individuals were named in the flyer.

Union member and member of the Union's dispatch rules committee along with Aldape, Don Taylor testified that Aldape's May 16 flyer contained errors. However, Taylor's testimony did not establish any knowing false statements in the flyer.

Wallace Realini filed grievance SP-0009-2010 against Aldape on May 19, 2010 alleging discrimination or harassment based upon political beliefs due to Aldape's May 16, 2010 flyer. A hearing was held on June 1, 2010 and September 7, 2010. Miller found Aldape not guilty of a section 13.2 violation and dismissed the grievance on the ground that there was no factual basis to predicate a 13.2 violation.

Grievance SP-0002-2010 was filed by Mark Jurisic on March 6, 2010. On March 8, 2010 Miller dismissed the grievance as not meeting the criteria of section 13.2. No appeal was filed.

B. The Analysis

Counsel for the General Counsel alleges in the complaint that by both PMA (in the Realini grievance) and ILWU'S (in the Droege and Bebich grievances) involvement in the prosecution of the 13.2 grievances against Aldape, including allowing the processing of the grievances when they were aware that Aldape's conduct was protected by section 7 of the Act, by ILWU's participation in the implementation of the penalties assessed against Aldape, and by PMA and ILWU's maintenance of the record of proceedings in the 13.2 grievances against Aldape, Respondents violated sections 8(a)(1) and 8(b)(1)(A) of the Act respectively.

1. Section 10(b) of the Act

Before addressing the substance of this case, there is a procedural issue that has been raised by ILWU concerning the application of section 10(b) of the Act to the portion of the charge dealing with the Droege and Bebich grievances. ILWU contends that the facts concerning both these grievances fall outside the 10(b) period. General Counsel contends that both grievances fall within the 10(b) period.

Under section 10(b) of the Act a complaint may not issue based on conduct occurring more than six months before the filing and service of the charge. In the instant case the first charge was filed against ILWU by Aldape on June 1, 2010¹⁹ and served on June 2, 2010.²⁰ The

¹⁸ GC Exh. 11.

¹⁹ GC Exh. 1(a).

²⁰ GC Exhs. 1(b) and 1(c).

charge alleges that ILWU violated section 8(b)(1)(A) of the Act by discriminating against Aldape because of his protected internal activities. Thus, the 10(b) period runs from December 2, 2009.

Counsel for the General counsel contends that the 10(b) period runs from the date the arbitration award was effectuated in the Droege grievance, citing *Barton Brands*, 298 NLRB 976, 978 (1990); *Postal Service Marina Center*, 271 NLRB 397 (1984); *Hospital Employees (Smithfield Hospital)*, 275 NLRB 272, 274 (1985); and *Machinists Local 68*, 274 NLRB 757, 759 (1985).

In *Postal Service Marina Center* at 399-400 the Board held, that in determining when the 10(b) period commences it will focus on the date of an alleged unlawful act rather than the date its consequences become effective, provided that a final and unequivocal adverse employment decision is made and communicated to an employee. Applying a similar analysis in the context of an arbitrator's award in *Hospital Employees (Smithtown Hospital)* at 274, where the complaint alleged that the respondent union violated the Act by petitioning the state court to enforce an arbitrator's award that afforded recognition based on tainted cards, the Board held that the 10(b) period began to run when the respondent filed the petition and not on issuance of the award.

In *Barton Brands*, the Board distinguished *Postal Service Marina Center* where an arbitrator awarded an employee's conditional reinstatement on the condition he did not seek union office. The Board held that the arbitrator's award did not constitute an employment decision by the Respondent. Rather, it was not until the employee won a union office and the Respondent then discharged the employee was the award effective. The Board held the Respondent was not compelled to discharge the employee on his election to union president. The Board noted that the conduct alleged to be unlawful in the complaint was the employee's discharge, not his earlier conditional reinstatement. With respect to that discharge, the adverse employment decision occurred and the statutory period began to run when the Respondent effectuated the award by terminating the employee following his election to the office of union president.

Here there was nothing conditional about the final decision of the Coast Appeals Officer entered on October 27, 2009, the date of the alleged unlawful act subjecting Aldape to work related penalties. In his brief, Counsel for the General Counsel, argues that the 10(b) period was somehow reactivated in the Droege grievance since the arbitrator and the Coast Appeals Officer reinstated a portion of the penalty that had been suspended from the Droege case in their *Bebich* decision. In *Bebich* the Coast Appeals Officer issued his decision on December 29, 2009, within the 10(b) period.

It is not the consequences but the unlawful action that commences the 10(b) period. Here Aldape was on notice on October 27, 2009, of the alleged unlawful action by the Coast Appeals Officer's final decision. While part of the penalty that had been suspended in Droege was reinstated as a result of the finding of an additional violation in *Bebich* in December 2009, the essential unlawful act had already taken place in October which commenced the 10(b) period. Accordingly, the alleged unlawful acts surrounding the Droege 13.2 grievance occurred over six months before filing and service of the charge herein against ILWU. I will dismiss those allegations surrounding the Droege grievance.

ILWU argues that the conduct surrounding the *Bebich* grievance also occurred outside the 10(b) period. ILWU inconsistently argues that ILWU took no part in processing the *Bebich* 13.2 grievance but that by November 17, 2009 when the first arbitration hearing took place Aldape should have been aware of ILWU's role in the grievance. Notwithstanding this argument, as noted above, Board law is clear that the 10(b) period will not run until a final

adverse employment decision is made and communicated to an employee. In this case there was no final decision in the Bebich case until the Coast Appeals Officer's decision of December 29, 2009, well within the 10(b) period.

5 2. Did Aldape's conduct fall within the Protection of Section 7 of the Act?

10 Counsel for the General Counsel contends that solely intra-union activity such as that engaged in by Aldape is protected by Section 7 of the Act citing *Stage Employees, IATSE Local 769*, 349 NLRB 71 n2 (2007); *Town & Country Supermarkets*, 340 NLRB 1410, 1410, 1430 (2004); *Mobil Oil Exploration & Producing, U.S., Inc.*, 325 NLRB 176, 178 (1997); *Teamster's Local 186*, 313 NLRB 1232, 1234-35 (1994); *Independent Dock Workers Local 1*, 330 NLRB 1348, 1352 (2000).

15 ILWU argues to the contrary that Aldape's conduct was not the type of activity encompassed by Section 7 citing *OPEIU, Local 251 (Sandia Corp., d/b/a/ Sandia National Laboratories)*, 331 NLRB 1417, 1424 (2000).

Section 7 of the Act states in pertinent part:

20 Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection

25 In *Sandia*, the dispute was essentially an intra-union factional quarrel over intra-union policies and politics. Rival union factions had a dispute over the payment of union funds to a law firm in settlement of a lawsuit. Ultimately one faction was expelled from the union over this internal union matter. The expulsion of the union members did not affect their employment relationship with Sandia National Laboratories.

30 Prior to *Sandia* the Board had held that internal union discipline for engaging in intra-union politics violated section 8(b)(1)(A) of the Act without any meaningful correlation to the employment relationship and policies of the Act. *Carpenters Local 22 (Graziano Construction)*, 195 NLRB 1 (1972). However, in *Sandia* the Board expressly overruled *Granziano* and held at page 1418:

35 [W]e find that Section 8(b)(1)(A)'s proper scope, in union discipline cases, is to proscribe union conduct against union members that impacts on the employment relationship, impairs access to the Board's processes, pertains to unacceptable methods of union coercion, such as physical violence in organizational or strike contexts, or otherwise impairs policies imbedded in the Act.

40 In elucidating on whether, intra-union activity is protected by Section 7 of the Act the Board said in *Sandia* at 1424:

45 Our dissenting colleague contends that the Respondent's discipline here contravenes a policy of the Act: that the discipline interferes with the Section 7 right to concertedly oppose the policies of union officials. We disagree. Our colleague overlooks that the right to concertedly oppose the policies of union officials is protected by Section 7 if that activity is "for the purpose of collective bargaining or other mutual aid or protection. . . ."

50 That protection is broad but not unlimited and it assumes that the activity bears some relation to the employees' interests as employees.

In two cases following *Sandia*, the Board first analyzed whether the employees' intra union activities implicated the employment relationship. In *United Steelworkers of America Local 9292, AFL–CIO, CLC (Allied Signal Technical Services Corporation)*, 336 NLRB 52, 54 (2001) the Board found arguably that an employee who filed internal charges over a union president's handling of the grievances was exercising his Section 7 right to question the adequacy of his Union's representation of the bargaining unit and to seek to redirect his union's policies and strategies for dealing with his Employer. Thus, by disciplining the employee for filing the charges, the union arguably restrained the employee in the exercise of his Section 7 rights within the meaning of Section 8(b)(1)(A). In *Local 254, Service Employees International Union, AFL–CIO (Brandeis University)*, 332 NLRB 1118, 1122 (2000) the Board began its analysis by determining which Section 7 rights were affected by the union removing an employee from his positions both as shop steward and union representative on the contractually created Labor-Management Committee. The Board concluded that the employee had been engaged in exercising his Section 7 right to "assist labor organizations." Additionally, the Board found, to the extent he was elected to these positions by his fellow employees, the employee's service as a union representative implicated the Section 7 right of his fellow employees "to bargain collectively through representatives of their own choosing."

Thus, since *Sandia*, union discipline of employees for their intra union activity is proscribed only if it interferes with the employment relationship, impairs access to the Board's processes, or pertains to unacceptable methods of union coercion, such as physical violence. However, as the Board noted in *Sandia*, there is a threshold issue that must be resolved before it is determined if intra union discipline impacts the employment relationship in violation of section 8(b)(1)(A) of the Act. First it must be established that the employee's intra union activity is protected by Section 7. To gain the protection of Section 7 the employee's intra union activity must bear some relation to collective bargaining or other mutual aid or protection, i.e., "the activity bears some relation to the employees' interests as employees" not merely intra union interests.

In the cases cited by Counsel for the General Counsel, *Mobil Oil Teamster's Local 186*, and *Independent Dock Workers Local*, *supra* were pre-*Sandia*. In addition in *Stage Employees, IATSE Local 769* and *Town & Country*, *supra* the disciplined employees' activity included conduct encompassed by Section 7 including protesting the ratification of a collective bargaining agreement and failure to operate a hiring hall in a non discriminatory manner.

In this case, as in *Sandia*, Aldape's conduct was purely intra local factional quarrelling over how the ILWU should be operated. Aldape engaged in vitriolic and unsubstantiated attacks against not only fellow Union members but members of their families. His attacks were not limited to those who held Union office but to anyone Aldape perceived as opposed to his position, including Jurisic and Bebich who were not ILWU office holders at the times of his libelous and slanderous statements.

Aldape's handbill in the Droege grievance, which scurrilously accused Jurisic's children of failing a drug and alcohol test, deals solely with intra union politics and bears no relation to collective bargaining or other "employees' interests as employees." Aldape's phone message that was the subject of the Bebich grievance was no more than an unveiled threat to disclose personally embarrassing facts about Bebich and has no relation to collective bargaining or other mutual aid or protection. Aldape's flyer in the Realini case dealt with internal union matters concerning mechanics, internal union meetings and motions at union meetings concerning dispatch of mechanics. These topics are all matters that bear no relation to collective bargaining or other mutual aid or protection or to "employees' interests as employees." I find

that Aldape’s intra-union activities that were the subject of the three 13.2 grievances were not protected by Section 7 of the Act. Accordingly, I will dismiss the remaining allegations of the complaint.

5

CONCLUSIONS OF LAW

1. Respondent PMA and its employer members is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

10

2. ILWU is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent’s did not violate sections 8(a)(1) or 8(b)(1)(A) of the Act.

15

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.²¹

ORDER

20

IT IS ORDERED that the complaint is dismissed in its entirety.

Dated, Washington, D.C., September 26, 2011.

25

30

John J. McCarrick
Administrative Law Judge

35

40

45

50

²¹ If no exceptions are filed as provided by Section 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.